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Transnational Joint Ventures And Antitrust Analysis

GEORGE E. GARVEY*

The recent plight of the United States as an international trading nation is well documented.¹ The nation's trade deficit has grown dramatically over the past several years, reaching a record \$117.7 billion during 1985.² The United States has, in fact, become one of the largest debtor nations in the world.³ The reasons are complex and sometimes controversial. The strength of the dollar and the strong American economic recovery relative to our trading partners are immediate and obvious contributing factors to the American trade imbalance.⁴ The strength of the dollar, however, does not account fully for the deficit, as rapid depreciation of the dollar would have adverse consequences.⁵ "A depreciation of the dollar means a loss in purchasing power for the American consumer, which means a lower standard of living for us all."⁶

Other factors that contribute to the American trade dilemma include: (1) foreign trade barriers;⁷ (2) diminished growth of American productivity;⁸ and (3) excessive antitrust enforcement.⁹ Only governments can deal comprehensively with national tariff

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¹ See, e.g., 1 PRESIDENT'S COMMISSION ON INDUSTRIAL COMPETITIVENESS, GLOBAL COMPETITION: THE NEW REALITY, (1985) [hereinafter cited as GLOBAL COMPETITION]; OFFICE OF FOREIGN ECONOMIC RESEARCH, U.S. DEP'T OF LABOR, REPORT OF THE PRESIDENT ON U.S. COMPETITIVENESS TOGETHER WITH THE STUDY ON U.S. COMPETITIVENESS (1980) [hereinafter cited as REPORT OF THE PRESIDENT].

² Auerbach, *Trade Gap Hits Record*, Wash. Post, Mar. 19, 1986, at G1, col. 6.

³ *Id.*

⁴ Johnson & Szarek, *Effects of Strong Dollar, Economic Recovery Apparent in First-Half Import and Export Prices*, 107 MONTHLY LAB. REV. 3-4 (Oct. 1984).

⁵ GLOBAL COMPETITION, *supra* note 1, at 14.

⁶ *Id.*

⁷ See J. JACKSON, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 440-43 (1977).

⁸ GLOBAL COMPETITION, *supra* note 1, at 11.

⁹ M. DAWSON, LESSONS FROM THE PAST: A COMPARATIVE STUDY OF NATIONAL EXPORT EXPANSION PROGRAMS 1963-1980, at 3 (undated study published by the Landegger

and nontariff trade barriers. International governmental organizations such as the General Agreement on Tariffs and Trade (GATT), for example, are committed to an overall reduction in barriers through periodic multinational negotiations.¹⁰ Private enterprise, on the other hand, is generally ill-equipped to affect national trade policies directly. Indeed, firms that have had sufficient economic strength with which to influence foreign national policies have found themselves condemned for corruption both at home and abroad.¹¹

The waning of American productivity is difficult both to explain and remedy.¹² The reasons for this decline vary from industry to industry. The U.S. steel industry, for example, largely failed to modernize production facilities, incurred excessive labor costs, and pursued pricing policies that induced greater foreign competition.¹³ Other industries suffer under conditions over which they have little or no control, such as relatively high U.S. capital costs¹⁴ and exchange rates that favor foreign producers.¹⁵ In addition, there may be substantial diversity among the producers within any particular industry, and, consequently, firms are likely to function at different levels of efficiency.

Only the government can bring about economy-wide changes intended to enhance productivity. The current debate over "industrial policy" is evidence that American law and policy makers are acutely aware of the problem.¹⁶ A remedial consensus, how-

Program in Int'l Bus. Diplomacy at Georgetown Univ. School of Foreign Service); GLOBAL COMPETITION, *supra* note 1, at 42-43.

¹⁰ A. LOWENFELD, INTERNATIONAL ECONOMIC LAW, PUBLIC CONTROLS ON INTERNATIONAL TRADE VI 21-7 (1979).

¹¹ S. REP. NO. 114, 95th Cong., 1st Sess. 3-4 (1977).

¹² See *The Productivity Growth Slowdown*, 71 AM. ECON. REV. 314 (1981).

¹³ "Corporate Initiative:" Oversight Hearings on Corporate Initiative Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 97th Cong., 1st Sess. 35-39 (1981) (statement of F.M. Scherer).

¹⁴ U.S. DEP'T OF COMMERCE, A HISTORICAL COMPARISON OF THE COST OF FINANCIAL CAPITAL IN FRANCE, THE FEDERAL REPUBLIC OF GERMANY, JAPAN, AND THE UNITED STATES (1983); GLOBAL COMPETITION, *supra* note 1, at 26-27.

¹⁵ GLOBAL COMPETITION, *supra* note 1, at 18, chart 7. The Report of the President's Commission on Industrial Competitiveness is remarkable for its candid recognition that there are areas of comparative disadvantage that the United States should accept. High wages and an unfavorable exchange rate, for example, within reason increase the standard of living for Americans. The Commission, therefore, believes that the United States should focus on improving its relative advantages in those areas where it traditionally has been strong. *Id.* at 6-7, 18.

¹⁶ See, e.g., Berry, *Leading Economists Dispute the Case for an "Industrial Policy,"* Wash. Post, Sept. 4, 1983, at G1, col. 1; Behr, *Schultze Attacks Premise of New Industrial Policy,* Wash. Post, Sept. 29, 1983, at B1, col. 1; Pine, *Debate Heats Up Again on Industrial Policy,* Wall St. J., Oct. 11, 1982, at 1, col. 5; Malmgren, *Notes for a U.S. Industrial Policy,* CHAL-

ever, has been elusive. Views about the propriety, extent and nature of government intervention are diverse.¹⁷ The government arguably may affect productivity by changing monetary, fiscal, tax, or trade policies, alone or in some combination. A comprehensive analysis of industrial policy is beyond the scope of this article, although, in the author's judgment, a sound policy should rely largely on markets to achieve productive and allocative efficiency and use government resources to increase understanding of the likely impact of legal and political policy decisions on productivity.

The antitrust laws have frequently been identified as a needless barrier to beneficial international competitive activities.¹⁸ Sparse evidence exists, however, that antitrust has actually impaired healthy international competition.¹⁹ Moreover, recent legislation—Title IV of the Export Trading Company Act of 1982²⁰—eliminated even the perception that antitrust poses a barrier to concerted export activities not having a direct, substantial, and reasonably foreseeable anticompetitive effect on domestic commerce or competitors.²¹ One should not, therefore, exaggerate the role that antitrust enforcement and policy play in international trade. Particularly in light of the current emphasis on efficiency in antitrust enforcement, proposed changes in the law seem to be gimmicks²² that either promise unrealistically to simplify international trade or foster the goals of those seeking to

LENGE, Jan.-Feb. 1981, at 19; *Reindustrialization: Politics and Economics*, CHALLENGE, Jan.-Feb. 1981, at 39 (interview with Adlai E. Stevenson).

¹⁷ See Berry, *supra* note 16.

¹⁸ See Dawson, *supra* note 9, at 3.

¹⁹ Garvey, *The Foreign Trade Antitrust Improvements Act of 1981*, 14 LAW & POL'Y INT'L BUS. 1, 4-5 (1982); U.S. DEP'T OF COMMERCE, REPORT OF THE PRESIDENT ON EXPORT PROMOTION FUNCTIONS AND POTENTIAL EXPORT DISINCENTIVES 1-9 (1980); Ongman, *Is Somebody Crying "Wolf"? An Assessment of Whether Antitrust Impedes Export Trade*, 1 NW. J. INT'L L. & BUS. 163, 218 (1979).

²⁰ 15 U.S.C. § 6(a) (1982).

²¹ *Id.* Title IV, which was designated "Foreign Trade Antitrust Improvements," was intended to eliminate needless uncertainty regarding the reach of U.S. antitrust laws to joint export activities. H.R. REP. NO. 686, 97th Cong., 2d Sess. 6-7 (1982).

²² In 1980, for example, the Wall Street Journal editorialized about a then-pending bill, S. 2718, 96th Cong., 2d Sess. (1980), as follows:

At best the Stevenson bill is mere gimmickry. It is being marketed under the false pretense that it will help encourage the development of American trading companies comparable to Mitsubishi, Mitsui, C. Itoh and the other companies that have been so effective in selling Japanese wares around the world. Since Japanese banks often have ownership positions in their country's trading companies, the Stevenson bill's proponents argue that investments by American banks will help this country develop similar institutions. And since Japan and most Western European countries exempt exporting from domestic

form cartels in international markets.²³ In fact, altering antitrust policy will have limited impact on the volume of overall trade, and will have a negative impact to the extent that firms are allowed to establish and exploit monopolies.

One modest change in (or clarification of) antitrust policy, however, may have salutary effects on international trade. Transnational joint ventures that enhance productivity, whether through additional production or better facilities or distribution, should enjoy a strong presumption of validity. The costs of transacting international business, including the cost of risk-bearing, are difficult to identify and calculate, while the benefits of increased productivity are tangible. Moreover, the anticipated harm to competition that results from such ventures is often speculative and based on theories that may not fully account for the complexity of international business organization.²⁴

This article develops the argument for lenient treatment of transnational joint ventures in several sections. The first section defines a joint venture. The second and third summarize the historical application of the antitrust laws to joint ventures in general, and to transnational joint ventures in particular. The fourth section explores the economic bases for analysis and briefly notes some relevant political considerations. The fifth section analyzes the application of antitrust principles to transnational ventures, emphasizing the leading historic and contemporary judicial decisions, and attempting to identify and critique the developing analytical approaches. Finally, the article suggests a judicial and

antitrust laws, the bill's advocates argue that American trading firms need a similar dispensation.

All of which is so much hokum. The success of Japanese trading companies lies not in their ownership structures or their antitrust freedoms, but in their detailed knowledge of production sources and market opportunities around the world, as well as their logistical skills in carrying through complicated international transactions. Nothing stops American firms from offering similar services, and indeed many already do. And there are hundreds of foreign sales agents, manufacturers' representatives and so on to serve the export needs of American industrialists.

But the Stevenson bill does pose some dangers. By endorsing and expanding the principle of export cartels, it undermines the U.S. commitment to an open international trading system. How can we complain about OPEC or Third World cartels if we encourage our sulphur or carbon black producers to form their own export cartels?

Export Gimmickry, Wall St. J., Sept. 2, 1980, at 26, col. 1.

²³ See Rahl, *International Cartels and Their Regulation*, in *INTERNATIONAL BUSINESS: LAW AND POLICY OF RESTRICTIVE PRACTICES* 240-268 (O. Schacter & R. Hellawell eds. 1981).

²⁴ See, e.g., *infra* notes 197-219 and accompanying text.

legislative response that would conform antitrust analysis to the realities of international commerce that make joint ventures an appropriate, and often essential organizational structure for transnational business.

I. DEFINING A JOINT VENTURE

The joint venture has been an antitrust will-o'-the-wisp, an amorphous business entity devoid of prescribed form or content. Professor Areeda has called it "an expansive notion without definite meaning or antitrust consequence."²⁵ Areeda is correct in asserting that the term has historically lacked the precision of an antitrust term of art. Sporadic antitrust decisions, however, implicitly recognize, in their determinations regarding either liability or remedies, the value of specific cooperative organizational structures.²⁶ Moreover, in recent years the courts have often characterized a relationship as a joint venture to signal, or perhaps justify, a sympathetic analysis.²⁷ The characterization has therefore assumed greater antitrust significance than its vague analytical content might suggest.

Professor Brodley suggests a functional definition of joint venture that is shaped to fit antitrust analysis.²⁸ In Brodley's view, a joint venture should: (1) be controlled jointly by the parents; (2) have received substantial contributions from the parents; (3) be an entity separate from its parents; and (4) create "significant new enterprise capability."²⁹ Other entities would, for antitrust purposes, be treated as something other than joint ventures. The definition is somewhat arbitrary, since it excludes business organizations properly identified for other purposes as joint ventures. It is useful, however, because it identifies the characteristics of joint enterprise that both require and help withstand serious antitrust scrutiny: they may facilitate collusion, but they may also foster efficiency. Joint ventures, therefore, merit neither unreasoned approval nor unreasoned condemnation—the sorts of results that flow from an analysis based on the generalizations of a per se rule.

²⁵ P. AREEDA, *ANTITRUST ANALYSIS* 471 (3d ed. 1981).

²⁶ See *infra* notes 56–66, 79–105 and accompanying text.

²⁷ See, e.g., *Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1, 23 (1979); *cf. Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 302 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

²⁸ Brodley, *Joint Ventures and Antitrust Policy*, 95 HARV. L. REV. 1521, 1524–27 (1982).

²⁹ *Id.* at 1526.

As the term is used in this article, a "joint venture" possesses the characteristics identified by Professor Brodley. Primarily, the joint venture is an entity separate from its parents which creates "significant new enterprise capability."³⁰ In addition, a transnational venture must have at least one American and one foreign venturer. One should adjust the requirements that the parents jointly control and make substantial contributions to the venture, however, based upon the exigencies of international transactions. Finally, national trade policies may shape both the ability of the parents to exercise control over the venture, and the nature and amount of contributions to it.³¹

II. APPLICATION OF ANTITRUST LAWS TO JOINT VENTURES

Joint ventures, like other business entities, are subject to scrutiny under the Sherman Act,³² the Clayton Act,³³ and section 5 of the Federal Trade Commission Act.³⁴ Section 2 of the Sherman Act proscribes monopolization and attempts or combinations to monopolize.³⁵ A venture that improperly achieves or exercises monopoly power violates section 2.³⁶ Section 1 of the Sherman Act forbids contracts, combinations, and conspiracies that unrea-

³⁰ A cooperative venture that eliminates or reduces productive or distributive capacity, in contrast, is engaging in classic cartel behavior, and a different standard from the one proposed here should apply. Unfortunately, the primary antitrust exemption intended to promote export trade, the Webb-Pomerene Act, 15 U.S.C. § 61-66 (1982), has tended to promote price-fixing (i.e., production limiting) ventures. 1 NAT'L COMM'N FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL 296-97 (1979) [hereinafter cited as NAT'L COMM'N].

³¹ See, e.g., Radway, *Antitrust, Technology Transfers and Joint Ventures in Latin American Development*, 15 LAW. AM. 47 (1983).

³² 15 U.S.C. §§ 1-7 (1982).

³³ 15 U.S.C. §§ 12-27 (1982).

³⁴ 15 U.S.C. § 45 (1982). Export ventures are also covered by the Webb-Pomerene Act, 15 U.S.C. §§ 61-65 (1980), and Title III of the Export Trading Company Act of 1982, 15 U.S.C. § 4017 (1982). Ventures affecting import trade are also subject to the prohibitions of the Wilson Tariff Act, 15 U.S.C. 8 (1982), and possibly § 1337 of the Tariff Act of 1930, 19 U.S.C. § 1337 (1982). The primary focus of this article, however, is on the structural aspects of joint ventures, and it does not generally consider the potential application of these various statutes to the ventures' activities.

³⁵ 15 U.S.C. § 2 (1982).

³⁶ The courts have consistently held that monopoly itself is not prohibited. See, e.g., *Standard Oil Co. v. United States*, 221 U.S. 1, 58-62 (1911); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 429-30 (2d Cir. 1945) [hereinafter cited as *Alcoa*]. Over time, the courts have failed to articulate clearly or apply uniformly the factors that convert an otherwise legal monopoly into an illegal monopoly under the Sherman Act. Compare, *Standard Oil*, 221 U.S. at 58-62, with *United States v. Griffith*, 334 U.S. 100, 106-07 (1948) and *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 338-46 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954). A specific intent to monopolize also violates the Act, when coupled with a great likelihood of success. *Swift and Co. v. United States*, 196 U.S. 375, 396 (1905); L. SULLIVAN, ANTITRUST 134 (1977).

sonably restrain the interstate or foreign commerce of the United States.³⁷ Violation of either section 1 or section 2 is a felony subject to imprisonment and fine.³⁸ Private parties injured by a violation may also sue for treble damages in addition to the costs of the suit.³⁹

Section 7 of the Clayton Act⁴⁰ prohibits mergers or acquisitions, including the creation of jointly owned ventures,⁴¹ that may substantially lessen competition or tend to create a monopoly in any product line in any region of the United States. Section 7 is more problematic for prospective ventures than sections 1 or 2 of the Sherman Act because it reaches conduct that has not yet had anticompetitive effects.⁴²

Section 5 of the Federal Trade Commission Act prohibits "unfair methods of competition."⁴³ This provision generally reaches activities that violate either the Sherman or Clayton Act, as well as similar conduct that has not yet violated these other laws.⁴⁴ Although section 5 is applicable to international joint ventures,⁴⁵ this article will not discuss it independently. The reader, however, should be aware that activities that violate the Sherman Act or the Clayton Act may also violate section 5 of the FTC Act.

A. *The Sherman Act*

The antitrust laws have traditionally distinguished between the internal operations of a firm and the external relationships between firms.⁴⁶ A firm is generally free to make independent deci-

³⁷ 15 U.S.C. § 1 (1982). The "reasonable" element is the product of judicial gloss. See, e.g., *Standard Oil*, 221 U.S. at 60.

³⁸ 15 U.S.C. §§ 1, 2 (1982).

³⁹ Clayton Act § 4, 15 U.S.C. § 15 (1982).

⁴⁰ 15 U.S.C. § 18 (1982).

⁴¹ *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 167-68 (1964).

⁴² *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 505 (1974); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 362 (1963).

⁴³ 15 U.S.C. § 45(a)(1) (1982).

⁴⁴ *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5 (1972); *FTC v. Brown Shoe Co.*, 384 U.S. 316, 321 (1966).

⁴⁵ B. HAWK, *UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE* 278 (1982).

⁴⁶ The Supreme Court has recently articulated the reason for the legal distinction between internal operations and external coordination:

The reason Congress treated concerted behavior more strictly than unilateral behavior is readily appreciated. Concerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately

sions about price and output, unless it improperly achieves and exercises substantial monopoly power. One firm acting alone cannot violate section 1 of the Sherman Act.⁴⁷ When two or more independent firms agree to engage in activities that will affect prices, production, or distribution, however, they are subject to antitrust scrutiny and may face outright condemnation.⁴⁸ If they are competitors, the reasonableness of their alliance, their market power, and the actual effect of their actions are often considered irrelevant.⁴⁹

Judicial interpretations of the Sherman Act refuse, by and large, to recognize value in organizational structures other than total integration of a firm.⁵⁰ The courts have been insensitive to the potential value of partial integration.⁵¹ Antitrust law has thus treated joint ventures as contracts, combinations, or conspiracies subject to the same per se rules that apply to cartels. The Supreme Court, for example, stated in *Timken Roller Bearing Co. v. United States*⁵² that it found no "support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a 'joint venture.'"⁵³

1. *The Rule of Reason Era*

When the rule of reason held full sway in antitrust analysis,⁵⁴ the distinction between joint ventures and other forms of combi-

are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction. Of course, such mergings of resources may well lead to efficiencies that benefit consumers, but their anticompetitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly.

Copperweld Corp. v. Independence Tube Corp., 104 S. Ct. 2731, 2741 (1984).

⁴⁷ P. AREEDA, *supra* note 25, at 350.

⁴⁸ See *United States v. Topco Assocs.*, 405 U.S. 596 (1972); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

⁴⁹ See *Socony-Vacuum*, 310 U.S. at 224 n.59.

⁵⁰ Much of the law regarding the "contract, combination . . . or conspiracy" element of section 1 has developed in the context of "intra-enterprise" activities. Until very recently, separate legal entities were treated as capable of conspiring regardless of the actual economic relationships between them. The *Copperweld* decision, however, has moderated this doctrine somewhat. Under *Copperweld*, a parent cannot violate the law by "conspiring" with its wholly-owned subsidiary. 104 S. Ct. at 2742.

⁵¹ But see *Copperweld*, 104 S. Ct. at 2743.

⁵² 341 U.S. 593 (1951).

⁵³ *Id.* at 598.

⁵⁴ From the Supreme Court's decision in *Standard Oil*, 221 U.S. 1, until *Socony-Vacuum*, 310 U.S. 150, the Court demonstrated a strong commitment to the rule of reason.

nation was insignificant. A court had to consider all of the circumstances surrounding a restraint to determine if it was, on balance, reasonable. Justice Brandeis's classic articulation of the rule of reason noted that the proper test is "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."⁵⁵

The flexibility of the rule of reason and its focus on actual competitive impact permitted courts to uphold ventures that enhanced competition. Early antitrust decisions such as *United States v. Terminal Railroad Association*,⁵⁶ *Chicago Board of Trade v. United States*⁵⁷ and *Appalachian Coals, Inc. v. United States*⁵⁸ recognized the potential value of cooperative ventures. In the *Terminal Railroad* case, for example, fourteen railroads formed an association to acquire the three previously independent terminal operators in St. Louis. Although the topography of St. Louis made it impractical for other railroads to build their own terminal facilities, the Association excluded or discriminated against nonmember competitors. Under these circumstances, the Court found that the combination violated the Sherman Act. The decision, however, implicitly recognized the economic value of the venture. The Court noted that the existence of several independent terminal operators "resulted in some cases in an unnecessary duplication of facilities."⁵⁹ Moreover, despite the violation, the Court did not dissolve the Association. Rather, it required the Association to admit new members and to provide its services to nonmembers on a nondiscriminatory basis.⁶⁰ Finally, the Court stressed that this cooperative venture would have posed no problem if it had been physically practical to build alternative terminal facilities.⁶¹

The *Chicago Board of Trade* case upheld the Board's "call rule," a price restraint imposed by the Board on its members.⁶² During the hours the Board was closed, its members could purchase grain being shipped to Chicago only at the last quoted price. Justice Brandeis' majority opinion identified the benefits of the rule,

⁵⁵ *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

⁵⁶ 224 U.S. 383 (1912).

⁵⁷ 246 U.S. 231 (1918).

⁵⁸ 288 U.S. 344 (1933).

⁵⁹ *Terminal Railroad*, 224 U.S. at 393.

⁶⁰ *Id.* at 411.

⁶¹ *Id.* at 405.

⁶² *Chicago Bd. of Trade*, 246 U.S. 231.

which included the maintenance of a public market and the reduction of risk for buyers and sellers, and the Court held that the restraint was reasonable.⁶³

Finally, in *Appalachian Coals* the Supreme Court found that the creation of a common sales agency by 137 coal producers did not violate the Act.⁶⁴ The Court viewed the common agent as a reasonable response to the distressed conditions facing the coal industry. Also, the agency did not achieve monopoly power.⁶⁵ By channeling sales through a single agent, the coal producers were able to limit excessive production (mining a particular type of coal to fill a specific order invariably produced other types for which there might be no demand) and eliminate the unrealistic, apparent supply curve created by numerous sales agents competing to sell the same coal.⁶⁶

These early decisions share some significant characteristics. For one thing, the fact that a combination exercised power over price was not controlling. It was only one factor weighed against the competing beneficial effects of the ventures. Most significantly, the Court in each of these cases appreciated the potential efficiency gains that limited integration through a cooperative venture could achieve.

2. *The Per Se Era*

The ascendancy of per se rules created a serious problem for joint ventures. Beginning with *United States v. Socony-Vacuum Co.*⁶⁷ in 1940 and extending through the mid-1970s, the Supreme Court adopted near-conclusive presumptions that certain types of conduct were anticompetitive. Price-fixing,⁶⁸ market allocation,⁶⁹ tying agreements⁷⁰ and boycotts⁷¹ were either condemned

⁶³ *Id.* at 240-41.

⁶⁴ *Appalachian Coals*, 288 U.S. 344.

⁶⁵ *See id.* at 375.

⁶⁶ *Id.* at 363. The practice of selling through numerous agents, known as pyramiding, created the impression that the supply of coal greatly exceeded the amounts actually available. This exacerbated the problems caused by the excessive amount of coal that was in fact in the market. *Id.*

⁶⁷ 310 U.S. 150. *Socony-Vacuum* is the strongest modern articulation of the per se rule, but it should be noted that there were earlier hints at a per se approach in the context of price-fixing. *See, e.g.*, *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, *aff'd*, 175 U.S. 211 (1899).

⁶⁸ *See Socony-Vacuum*, 310 U.S. 150; *Trenton Potteries Co.*, 273 U.S. 392; *Addyston Pipe & Steel Co.*, 85 F. 271.

⁶⁹ *United States v. Topco Assocs.*, 405 U.S. 596 (1972).

⁷⁰ *N. Pac. Ry. v. United States*, 356 U.S. 1 (1958).

⁷¹ *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

outright or the available defenses in support of their use were severely limited. Judicial economy and legal certainty outweighed, in the Court's view, any lost efficiency.⁷²

As courts focused on conduct, and generalized about economic consequences, they de-emphasized the relationships between the parties. The law condemned joint activity falling within a per se rule, regardless of the relationship between the parties. Justice Douglas articulated the extreme position:

What may not be done by two companies who decide to divide a market surely cannot be done by the convenient creation of a legal umbrella—whether joint venture or common ownership and control. . . . under which they achieve the same objective by moving in unison.⁷³

Socony-Vacuum, the origin of the modern per se rules, represented a significant shift from the earlier sympathetic approach to efficiency-enhancing cooperative conduct. Under circumstances remarkably similar to those in *Appalachian Coals*, the Court disregarded the plight of the industry and the claimed benefits of the agreement at issue.⁷⁴ Any tampering with price structures, it held, is "beyond the pale."⁷⁵

Two other cases from this era exemplify the Court's disregard for the potential benefits of joint ventures. In *United States v. Topco Associates*⁷⁶ the Court condemned an association of independent grocery stores for allocating exclusive sales territories among members selling Topco brand products. Topco argued that its members could not adequately promote the Topco brand unless they were protected against competition from other Topco sellers. Protecting its members against intra-brand competition, the Association argued, enhanced their ability to compete with national chains. The District Court agreed with Topco

⁷² See *Topco Assocs.*, 405 U.S. 609–10.

⁷³ *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 181 (1964) (Douglas, J., dissenting) (citation omitted).

⁷⁴ *Socony-Vacuum*, 310 U.S. 150. The defendant oil refiners in *Socony-Vacuum* faced a market glutted with gasoline, some produced illegally. Crude oil producers were unwilling to stop pumping oil since it was difficult to recapture a capped well and smaller refiners were unable to store their output. In some places, gasoline was selling below the costs of production. Consequently, the defendants, large refiners, agreed to purchase and store the excess gasoline. Neither the distressed state of the industry, the fact that prices were still determined by market forces (less the excess gasoline), nor existing government policies fostering the reduction in available gasoline could justify the scheme.

⁷⁵ *Socony-Vacuum*, 310 U.S. at 221.

⁷⁶ 405 U.S. 596 (1972).

and ruled in its favor. The Supreme Court reversed, however, holding that market allocations are illegal per se:

Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated per se rules.

In applying these rigid rules, the Court has consistently rejected the notion that naked restraints of trade are to be tolerated because they are well intended or because they are allegedly developed to increase competition.⁷⁷

*Fashion Originators' Guild of America v. FTC*⁷⁸ reached a similar result. The Fashion Originators' Guild of America (FOGA) was an association of fashion designers created in part to deal with the problem of fashion piracy—copying designs for sale in competition with the originals. Among other things, FOGA established a mechanism to detect and boycott retailers selling copied garments. The FTC refused to admit much of the evidence offered by FOGA to establish that the practices were beneficial to producers, workers, sellers and buyers of original fashions. A concerted refusal to deal could not be justified, so the Supreme Court affirmed.

There were exceptional cases during this period. In *United States v. Morgan*,⁷⁹ for example, the government challenged a syndication of investment bankers. The district court, stressing that investment banking syndication is *sui generis*, upheld the venture.⁸⁰ Syndication brought into existence a unique entity geared to “shap[e] up the issue, underwrit[e] the risk and pla[n] and carr[y] out the distribution.”⁸¹ The court did not treat the participating investment bankers as competitors.

*Associated Press v. United States*⁸² represented another exception to the rigid per se approach to antitrust analysis. Associated Press (AP) provided a world-wide news gathering service to member newspapers. AP was the world's largest news service, and its bylaws prohibited AP or any of its members from provid-

⁷⁷ *Id.* at 609–10 (citations omitted).

⁷⁸ 312 U.S. 457 (1941). The *Fashion Originators Guild* case was decided under section 5 of the Federal Trade Commission Act. It drew analogies, however, to Sherman Act cases, and the Supreme Court subsequently cited *Fashion Originators Guild* as authority for a rigid Sherman Act per se rule against boycotts. *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207, 212 (1959).

⁷⁹ 118 F. Supp. 621 (S.D.N.Y. 1953).

⁸⁰ *Id.* at 689.

⁸¹ *Id.* at 690.

⁸² 326 U.S. 1 (1945).

ing news to nonmembers. The bylaws also granted member newspapers an effective veto over the admission of competing papers. The Supreme Court upheld the district court's finding that the use of this collective power to exclude competitors violated the Sherman Act. However, in spite of a finding that the exclusion of newspapers from AP put these papers at a competitive disadvantage,⁸³ the Court allowed AP to adopt new bylaws that could exclude new members for noncompetitive reasons.⁸⁴

The *Morgan* and *Associated Press* cases demonstrate that antitrust analysis has never fully rejected the potential benefits attainable through cooperative ventures. These decisions implicitly recognized that individual firms cannot support some desirable conduct, such as financing corporate expansion or gathering and disseminating news, or will not support this conduct if their competitors can readily appropriate its products without compensation.⁸⁵ On the whole, however, antitrust analysis was hostile to combinations of actual or potential competitors and insensitive to purported competitive gains during this era of per se analysis.⁸⁶

3. *The Modern Era*

In more recent years, the Supreme Court has demonstrated increased awareness of efficiency which is possible through limited integration. The term "joint venture" has acquired antitrust significance. Characterization of an agreement as a joint venture today removes it from per se analysis; its validity is once again judged by the rule of reason.⁸⁷

*Broadcast Music, Inc. v. Columbia Broadcasting System*⁸⁸ dramatically illustrates the shift in the judicial attitude toward cooperative ventures. Defendants BMI and ASCAP are comprised of

⁸³ *Id.* at 13-14.

⁸⁴ *Id.* at 21.

⁸⁵ Members of the Supreme Court have long recognized the problem of the free rider. *Cf. Int'l News Serv. v. Associated Press*, 248 U.S. 215, 237-41 (1918) (finding it unlawful for one news service to appropriate, for profit, the product of another's labor). It has taken on increased significance, however, in recent years. *See, e.g., Continental T. V. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977); *Broadcast Music, Inc. v. Moor-Law, Inc.*, 527 F. Supp. 758 (D. Del. 1981).

⁸⁶ *See, e.g., Topco Assocs.*, 405 U.S. at 606-11 (finding that sales restraints imposed upon members of a cooperative association of supermarkets were per se violations of the Sherman Act).

⁸⁷ Brodley, *supra* note 28, at 1535; E. SULLIVAN & H. HOVENKAMP, *ANTITRUST LAW POLICY AND PROCEDURE* 235 (1984). *See Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 302 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

⁸⁸ 441 U.S. 1 (1979).

thousands of composers, authors and publishers.⁸⁹ They license and enforce the copyrights of their members, primarily through "blanket licenses" that authorize the licensee to use any copyrighted composition of any member for a set fee.⁹⁰ The fees are generally unrelated to the volume of use of the copyrighted materials.⁹¹ CBS alleged that the blanket license amounted to price-fixing between the societies' members. The district court dismissed the complaint after trial, but the court of appeals reversed, holding that the conduct was price fixing and, therefore, illegal per se.⁹² The Supreme Court reversed, stating that, "[t]o the Court of Appeals and CBS, the blanket license involves 'price fixing' in the literal sense: the composers and publishing houses have joined together into an organization that sets its price for the blanket license it sells. . . . Literalness is overly simplistic and often overbroad."⁹³ The Court identified several characteristics that required analysis under the rule of reason. The costs of individual transactions and enforcement called for a "middleman with a blanket license."⁹⁴ Moreover, the combination achieved a synergistic effect; the blanket license was a "different product" from the sum of individual licenses.⁹⁵

The most striking aspect of recent developments is judicial recognition that the way a venture is organized, as well as the conduct in which it engages, can have competitive significance. As already noted, the Court allowed some joint endeavors even during the period when it applied rigid per se rules.⁹⁶ Those cases tended to focus, however, on the unique characteristics of the particular industry (e.g., sports⁹⁷ or investment banking⁹⁸) or on the extraordinary economic problems facing the parties to the venture.⁹⁹ Even the *Broadcast Music* decision noted that copyright licensing was *sui generis*.¹⁰⁰ There is a perceptible tendency, however, to find value in certain ventures because they are efficient.

⁸⁹ *Id.* at 4-5. ASCAP is the American Society of Composers, Authors and Publishers.

⁹⁰ *Id.* at 5.

⁹¹ *Id.*

⁹² *Id.* at 6.

⁹³ *Id.* at 8-9 (footnote omitted).

⁹⁴ *Id.* at 20.

⁹⁵ *Id.* at 21-22.

⁹⁶ See *supra* notes 57-61 and accompanying text.

⁹⁷ See, *NCAA v. Bd. of Regents*, 104 S. Ct. 2948, 2961 & n.24 (1984).

⁹⁸ *United States v. Morgan*, 118 F. Supp. 621 (S.D.N.Y. 1953).

⁹⁹ *Appalachian Coals*, 288 U.S. 344.

¹⁰⁰ *Broadcast Music*, 441 U.S. at 10 (quoting opinion below, 562 F.2d at 132).

Broadcast Music, for example, stated that “[j]oint ventures and other cooperative arrangements are also not usually unlawful. . . . where the agreement on price is necessary to market the product at all.”¹⁰¹ Several years after *Broadcast Music*, the Court found in *Arizona v. Maricopa County Medical Society*¹⁰² that two foundations of medical doctors violated section 1 of the Sherman Act by setting maximum fees. The Court again implicitly recognized that certain cooperative ventures are desirable. Distinguishing the illegal combination of doctors from cooperative activities that are legal and desirable, the Court stated:

The foundations are not analogous to partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit. In such joint ventures, the partnership is regarded as a single firm competing with other sellers in the market.¹⁰³

Finally, the Supreme Court in *NCAA v. Board of Regents*¹⁰⁴ confirmed its commitment to an analysis that focuses on the economic consequences of an agreement, rather than on its form. The Court characterized *Broadcast Music* as “squarely hold[ing] that a joint selling arrangement may be so efficient that it will increase seller’s aggregate output and thus be procompetitive.”¹⁰⁵

Several things now seem reasonably clear. The judiciary has grown increasingly sensitive to the potential value of joint ventures. The “firm” and “all else” dichotomy, prevalent in Sherman Act analysis for many years, no longer dominates. Consequently, courts are more likely to judge true joint ventures by a comprehensive rule of reason, regardless of the industry, nature of business, or economic plight of the venturers.

B. Section 7 of the Clayton Act

Section 7 of the Clayton Act¹⁰⁶ also poses a barrier to some international joint ventures. In 1964, the Supreme Court held in *United States v. Penn-Olin Chemical Co.*¹⁰⁷ that certain joint ventures must be treated as mergers under section 7. The Court treated

¹⁰¹ *Id.* at 23.

¹⁰² 457 U.S. 332 (1982).

¹⁰³ *Id.* at 356.

¹⁰⁴ *Board of Regents*, 104 S. Ct. 2948 (1984).

¹⁰⁵ *Id.* at 2961.

¹⁰⁶ 15 U.S.C. § 15 (1982).

¹⁰⁷ 378 U.S. 158 (1964).

the venture involved in *Penn-Olin*—a jointly owned plant for manufacturing sodium chlorate in the southeastern United States—as a product-extension merger for one partner (Olin) and a geographic-extension merger for the other (Pennsalt).¹⁰⁸ The Court held that the parents could not realistically be expected to compete with the new entity, and that the venture had to be judged under a potential entry theory.¹⁰⁹ The trial court thus had to determine if either partner would enter the market without the joint venture, and if the other would continue to be perceived as a potential entrant.¹¹⁰ The Court viewed such a situation as preferable to entry through the joint venture, producing one new competitor and leaving one moderating force in the wings.¹¹¹ *Penn-Olin*, however, recognized that joint ventures differ in one material respect from horizontal mergers: joint ventures generally add a competitor to the relevant market, while a horizontal merger eliminates one.¹¹² Although the Court at that time was applying a quasi-per se rule to horizontal ventures,¹¹³ this recognition of the important distinction between joint ventures and regular mergers signaled a more sympathetic analysis.

III. APPLICATION TO TRANSNATIONAL JOINT VENTURES

A. *Extraterritorial Application Generally*

This section develops the historic application of antitrust law and policy to international joint ventures. To clarify the discussion, however, the law as it relates generally to the extraterritorial application of antitrust is briefly summarized.

In *American Banana Co. v. United Fruit Co.*¹¹⁴ the Supreme Court held that the Sherman Act did not prohibit conduct occurring in foreign nations, even though Americans were party to the agreement and it adversely affected a competing American firm.¹¹⁵ The legality of foreign conduct was, in Justice Holmes's

¹⁰⁸ *Id.* at 172 n.5. Pennsalt was producing and selling sodium chlorate in the northwestern United States while Olin was a chemical manufacturer located in the southeast that was not producing the product. Prior to the creation of the joint manufacturing venture challenged in this case, Olin was selling Pennsalt's sodium chlorate in limited amounts in the southeast.

¹⁰⁹ *Id.* at 169, 171.

¹¹⁰ *Id.* at 175-76.

¹¹¹ *Id.* at 173-74.

¹¹² *Id.* at 170.

¹¹³ See, e.g., *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 362-67 (1963).

¹¹⁴ 213 U.S. 347 (1909).

¹¹⁵ The defendant, United Fruit Company, allegedly conspired with various foreign

words, "determined wholly by the law of the country where the act is done."¹¹⁶ *United States v. Aluminum Co. of America (Alcoa)*¹¹⁷, however, effectively put *American Banana* to rest.¹¹⁸ *Alcoa* held that all conduct intended to have and having an anticompetitive effect on U.S. foreign commerce violates the Sherman Act.¹¹⁹ Since *Alcoa*, the Act's application to foreign activities largely parallels its domestic applications.

There have been two significant developments in this area since *Alcoa*. The first was the explicit adoption of a comity standard in antitrust cases. In 1976, the Ninth Circuit Court of Appeals held in *Timberlane Lumber Co. v. Bank of America*,¹²⁰ that jurisdiction attaches to foreign conduct if (1) the activity has some actual or intended effect on U.S. commerce; (2) the effect presents an antitrust injury; and (3) "international comity and fairness" do not caution against the exercise of jurisdiction.¹²¹ Other courts have questioned the first two prongs of the *Timberlane* test,¹²² but the third prong's comity analysis has won wide acceptance.¹²³

Passage of the Export Trading Company Act of 1982¹²⁴ was the second major development since *Alcoa*. Title IV of the Act essentially codified existing enforcement policy,¹²⁵ limiting the reach of the Sherman Act and part of section 5 of the Federal Trade Commission Act to export activities having a "direct, substantive and reasonably foreseeable effect" on domestic commerce or on the export trade of a domestic competitor.¹²⁶ The Act was not intended to supplant the *Timberlane* comity analysis,

officials to prevent the plaintiff from successfully importing bananas to the United States. *Id.* at 354-55.

¹¹⁶ *Id.* at 356.

¹¹⁷ 148 F.2d 416 (2d Cir. 1945).

¹¹⁸ Although *Alcoa* clearly adopted an "effects" test, as opposed to the territorial approach of *American Banana*, several earlier decisions had made the original territorial standard of *American Banana* questionable. See, e.g., *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927); *Thomson v. Cayser*, 243 U.S. 66 (1917). For thorough discussions of the extraterritorial reach of U.S. antitrust laws, see B. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST 19-78, Supp. 11-29 (1982); 1 J. ATWOOD & K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 142-80 (2d ed. 1981).

¹¹⁹ *Alcoa*, 148 F.2d at 443-44.

¹²⁰ 549 F.2d 597 (9th Cir. 1976).

¹²¹ *Id.* at 613-15.

¹²² E.g., *Nat'l Bank of Can. v. Interbank Card Ass'n*, 666 F.2d 6, 8 (2d Cir. 1981).

¹²³ B. HAWK, *supra* note 118, at Supp. 18-25.

¹²⁴ 15 U.S.C. § 6(a) (Supp. 1984).

¹²⁵ Garvey, *supra* note 19, at 38-39 (1982). But see Rahl, *Reforming American Antitrust in Foreign Commerce*, 81 MICH. L. REV. 1130, 1137 (1983).

¹²⁶ 15 U.S.C. § 6(a) (1982).

but rather to clarify the threshold effects standard.¹²⁷

B. *Significant Transnational Joint Venture Decisions*

This section explores several historically significant decisions involving transnational joint ventures. The purpose is not to develop these opinions in depth, but rather to demonstrate broadly the enforcement policy prevalent among the courts. The decisions show, in the author's judgment, an undue lack of regard for the complexities and risks of international business transactions. These judicial analyses have given insufficient weight to factors that are unique to, or exaggerated in, an international context.

In *Timken Roller Bearing Co. v. United States*¹²⁸ the Supreme Court held that worldwide territorial allocation and pricing agreements between Timken and several related foreign manufacturers violated the Sherman Act. Timken argued that the agreements were ancillary to legitimate joint venture and trademark licensing agreements formed to cope efficiently with barriers to international trade.¹²⁹ The Court held, however, that Timken could not avoid the Sherman Act's prohibition against restrictive agreements by designating the relationship between the parties a joint venture.¹³⁰ The Court also considered of little moment the existence of foreign tariff and other barriers.¹³¹ The Sherman Act was, in the majority's view, unsympathetic to the potential benefits of foreign investment: "free foreign commerce in goods must [not] be sacrificed in order to foster export of American dollars for investment in foreign factories which sell abroad."¹³² Congress was the appropriate body to consider and remedy the complications of foreign commerce.¹³³ The remedy in *Timken*, however, demonstrated some sensitivity to the value of international joint ventures. Although three members of the Court¹³⁴ believed it appropriate to require Timken to sever its relationship with its British and French coventurers, the majority held it sufficient to enjoin the restrictive agreement.¹³⁵

In separate dissenting opinions, Justices Frankfurter and Jack-

¹²⁷ B. HAWK, *supra* note 118 at Supp. 25-28.

¹²⁸ 341 U.S. 593 (1951).

¹²⁹ *Id.* at 597.

¹³⁰ *Id.* at 598.

¹³¹ *Id.* at 599.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Justices Black, Douglas and Minton.

¹³⁵ See *Timken*, 341 U.S. at 603-04 (Reed, J., concurring).

son argued that the Court should not judge international transactions by the same standards that applied domestically.¹³⁶ Justice Jackson put the case well:

The philosophy of the Government, adopted by the Court, is that Timken's conduct is conspiracy to restrain trade solely because the venture made use of subsidiaries. It is forbidden thus to deal with and utilize subsidiaries to exploit foreign territories, because "parent and subsidiary corporations must accept the consequences of maintaining separate corporate entities," and that consequence is conspiracy to restrain trade. But not all agreements are conspiracies and not all restraints of trade are unlawful. In a world of tariffs, trade barriers, empire or domestic preferences, and various forms of parochialism from which we are by no means free, I think a rule that it is restraint of trade to enter a foreign market through a separate subsidiary of limited scope is virtually to foreclose foreign commerce of many kinds. It is one thing for competitors or a parent and its subsidiaries to divide the United States domestic market which is an economic and legal unit; it is another for an industry to recognize that foreign markets consist of many legal and economic units and to go after each through separate means. I think this decision will restrain more trade than it will make free.¹³⁷

*United States v. Minnesota Mining & Manufacturing*¹³⁸ represented another significant development in the same era as *Timken*.¹³⁹ The defendants, competing manufacturers of abrasive products in the United States, jointly owned abrasive manufacturing plants in Great Britain, Canada and Germany. The defendants alleged that "they took these joint steps to preserve and expand their foreign markets which were disappearing in the face of foreign countries' tariffs, quotas, import controls, dollar shortages, foreign exchange restrictions, local preference campaigns and like nationalistic measures."¹⁴⁰ Judge Wyzanski, how-

¹³⁶ *Id.* at 605-06 (Frankfurter, J. and Jackson, J., dissenting).

¹³⁷ *Id.* at 607-08 (Jackson, J., dissenting) (footnote omitted). It is noteworthy that the Supreme Court has recently moderated its rigid separate entities approach, even in the context of domestic commerce. *Copperweld Corp. v. Independence Tube Corp.*, 104 S. Ct. 2731 (1984); see also *supra* note 50 and accompanying text; see *supra* text accompanying note 51.

¹³⁸ 92 F. Supp. 947 (D. Mass. 1950).

¹³⁹ *Minnesota Mining* is significant, at least in part, because its author, Judge Wyzanski, was a leading jurist in the effort to synthesize law and economic analysis. See also *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953).

¹⁴⁰ *Minnesota Mining*, 92 F. Supp. at 958.

ever, applied a rigid antitrust standard. His decision sanctioned such joint foreign activities by American companies only if it were economically impossible for the firms to export domestically produced goods.¹⁴¹ He further suggested that, at least in the context of an agreement between dominant firms, a foreign manufacturing venture could be a per se violation of the Sherman Act, even if it were impossible to export domestic goods.¹⁴² One could view the close association and exchange of data necessary for operation of such a foreign venture as a conspiracy with proscribed domestic effects.¹⁴³

*Yamaha Motor Co. v. FTC*¹⁴⁴ applied the *Penn-Olin* standard¹⁴⁵ to one significant transnational joint venture. In *Yamaha* the Eighth Circuit Court of Appeals upheld an FTC ruling that a joint venture between Yamaha and Brunswick violated section 7. Under the agreement, Brunswick, through a subsidiary named Mariner, acquired 38% of the stock of Sanshin Kogyo Company, a Yamaha subsidiary that manufactured outboard motors.¹⁴⁶ Yamaha retained 38% of the stock, and the two firms shared control of Sanshin.¹⁴⁷ Sanshin would produce and sell outboard motors to Yamaha and Mariner for resale under their names.

The FTC's administrative law judge originally upheld the venture, stating that "the main objective fact in this case. . . is that the joint venture added to the relevant market a new pro-competitive force—the Mariner line of outboard motors."¹⁴⁸ The Commission reversed the administrative judge, however, finding that Yamaha was an actual potential entrant into the U.S. outboard motor market.¹⁴⁹ Since Yamaha's subsequent independent entry would enhance competition in a concentrated market, the joint venture fell within the prohibitions of section 7.¹⁵⁰

The General Motors-Toyota (GM-Toyota) joint venture represents the latest and most permissive development in the appli-

¹⁴¹ *Id.* at 959.

¹⁴² *Id.* at 963.

¹⁴³ *Id.* *Minnesota Mining* is discussed further *infra* text accompanying notes 202–05.

¹⁴⁴ 657 F.2d 971 (8th Cir. 1981).

¹⁴⁵ See *supra* text accompanying notes 106–13.

¹⁴⁶ *In re Brunswick Corp.*, 94 F.T.C. 1174, 1176–77, 1187, 1263 (1979).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 1247.

¹⁴⁹ "[G]iven Yamaha's expansion history, strength in a variety of world and U.S. markets, development of an advanced motor that an existing U.S. competitor regarded as a market threat, with overall technological and financial capabilities, and stated entry plans regarding the U.S. outboard motor market. . . . Yamaha was an actual potential entrant into the U.S." *Id.* at 1272.

¹⁵⁰ *Yamaha*, 657 F.2d at 979–81.

cation of U.S. antitrust laws to transnational joint ventures. The Federal Trade Commission approved the venture after insisting on some modifications. The decision represents a fairly dramatic shift in the Commission's analytical approach and enforcement philosophy. Detailed discussion of the decision appears later in this article.¹⁵¹

IV. ECONOMIC AND POLITICAL CONSIDERATIONS

The increasingly benign legal view of joint ventures manifests in part the growing influence of two related economic developments. The "Chicago School"¹⁵² emphasis upon productive and allocative efficiency has had a significant effect upon antitrust jurisprudence.¹⁵³ It is, therefore, not remarkable that joint ventures, with their potential for efficient organization, are now less suspect than they were in an earlier era.

Transaction-cost economics has an impact on antitrust analysis, as well as on other areas of legal thought.¹⁵⁴ One major premise of traditional antitrust jurisprudence, for example, is increasingly difficult to justify: the "firm" and "all other entities" dichotomy¹⁵⁵ used for section 1 analysis embodied an unrealistic perception about the nature of the firm. Transaction costs largely control the exchange relationships between parties engaged in a common endeavor.¹⁵⁶ There are myriad organizational structures that can minimize the transaction costs of a cooperative venture, and the most efficient organization may

¹⁵¹ See *infra* text accompanying notes 220-53.

¹⁵² See, e.g., R. BORK, *THE ANTITRUST PARADOX* (1978); R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* (1976); Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979).

¹⁵³ Professor Hovenkamp maintains that modern antitrust developments have actually been informed by a synthesis of the Chicago and Harvard schools, the former focusing on price theory and the latter on industrial organization. H. HOVENKAMP, *ECONOMICS AND FEDERAL ANTITRUST LAW*, xvi (1984).

¹⁵⁴ Williamson, *Vertical Merger Guidelines: Interpreting the 1982 Reforms*, in *ANTITRUST POLICY IN TRANSITION: THE CONVERGENCE OF LAW AND ECONOMICS* 253, 260-65 (E. Fox & F. Halverson eds. 1984). Transaction cost economics is largely the offspring of Ronald Coase's famous theorem: "in an environment where there are no obstacles to transacting, legal rights will tend ultimately to be allocated, through trade if necessary, to the party that values them most highly, regardless of their initial assignment." C. GOETZ, *LAW AND ECONOMICS* 52 (1984). Coase identified the value of his seminal work as paving the way to analysis of "the real world of positive transaction costs." Coase, *The Coase Theorem and the Empty Core: A Comment* 24 J. L. & ECON. 183, 187 (1981). For an application of transaction costs analysis in a nonantitrust environment, see *Broadcast Music, Inc. v. Moor-Law, Inc.*, 527 F. Supp. 758 (D. Del. 1981).

¹⁵⁵ See *supra* text accompanying notes 46-53.

¹⁵⁶ R. POSNER, *ECONOMIC ANALYSIS OF LAW* 289-90 (2d ed. 1977); Williamson, *supra* note 154, at 260-64.

consist of varying degrees of integration at various levels of exchange.¹⁵⁷ Transaction-cost economics identifies two significant factors bearing on the ultimate structure of a joint endeavor: (1) bounded rationality; and (2) opportunism.¹⁵⁸ There are limits to the abilities of contracting parties to anticipate every contingency in extended economic relationships. Moreover, each party will act in its own self-interest when unanticipated contingencies arise. At times, therefore, a traditional contractual relationship will be unacceptable to parties seeking a mutually beneficial arrangement, and they may instead create a "firm." On the other hand, the size or scope of the desired enterprise may render unattainable the control essential to a firm.¹⁵⁹ Under such circumstances, some combination of firm (internal control) and market (contract) relationship may be necessary for the enterprise to thrive. This relationship is likely to be characterized as a joint venture.

The lessons learned from economics about the relationship between organization and transaction costs cannot be ignored in antitrust analysis. Antitrust policies that compel total integration may mandate transactional inefficiency, at times actually preventing an efficient organization from forming. This concern is especially pertinent in the context of international transactions, where rationality is especially "bounded," control tenuous, and the occasions for opportunism abundant.

A. *International Trade*

Classical economist David Ricardo developed the concept of "comparative advantage" to explain trade patterns among nations.¹⁶⁰ A nation will export those goods that it can produce relatively more efficiently than other nations, and will import those it cannot. Trade should occur even though one country has an absolute advantage or disadvantage in all of the goods being traded,¹⁶¹ since each nation will benefit. Government policies that interfere with such transfers—tariffs and quotas, for example—are deleterious to the nation imposing the restraints as

¹⁵⁷ See Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 1-2 (1984); Goetz and Scott, *Principles of Relational Contracts*, in READINGS IN THE ECONOMICS OF LAW AND REGULATION 152 (A. Ogus & C. Veljanovski eds. 1984).

¹⁵⁸ Williamson, *supra* note 154, at 261.

¹⁵⁹ R. POSNER, *supra* note 156, at 290.

¹⁶⁰ P. SAMUELSON, *ECONOMICS* 628 (11th ed. 1980).

¹⁶¹ *Id.* at 627.

well as to their targets.¹⁶²

Subsequently, the factor-abundance theory developed.¹⁶³ Numerous factors determine the level and quality of national output, including the availability of labor, land, and capital. These factors can be further broken down into skilled and unskilled labor, fertile and non-fertile land, and so on. Under the factor-abundance theory, nations will export those goods or services for which they possess an abundance of the required factors. The United States, for example, is rich in fertile land¹⁶⁴ and skilled labor;¹⁶⁵ it has therefore traditionally exported crops and the products of skilled laborers.¹⁶⁶

The level and flow of international trade is also influenced by a nation's knowledge and technological development.¹⁶⁷ A nation whose entrepreneurs and industrialists better understand market opportunities will have a comparative advantage in the production of new or differentiated products.¹⁶⁸ Likewise, a country with advanced technology will have an advantage in the market for goods produced with modern technology.¹⁶⁹ These advantages, however, are not constant; static theories cannot fully explain international trade. Knowledge and technology are transferable. Nations attaining these factors, therefore, may combine them with other abundant factors and change the direction of trade in the relevant goods.¹⁷⁰ Finally, capital, a major production factor, is also highly transferable.

In a world of absolute free trade, the factors of production would organize themselves internationally in order to achieve maximum productivity. First World capital and technology, for example, would unite with Third World labor where appropriate in order to minimize the costs of production. Today, however, one must add transaction-cost analysis to the equation. Even in a world of free trade, organizing the most efficient international transactions involves costs such as those of obtaining knowledge and avoiding opportunistic behavior. In the real world, trade

¹⁶² *Id.* at 634-36.

¹⁶³ REPORT OF THE PRESIDENT, *supra* note 1, at IV-4.

¹⁶⁴ *Id.* at IV-50.

¹⁶⁵ *Id.* at IV-4.

¹⁶⁶ *Id.* at III-1, IV-4.

¹⁶⁷ Bowen, *U.S. Comparative Advantage: A Review of the Theoretical and Empirical Literature*, in REPORT OF THE PRESIDENT, at 1-3, *supra* note 1.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

barriers greatly exacerbate these costs. This article cannot identify each potential form of transnational joint venture nor the costs involved in creating and maintaining each such venture. It will, however, analyze some of the potentially significant costs that may inhibit international transactions.

B. *Transaction Costs*

The costs of organizing enterprise across national lines are similar to those affecting intranational transactions. In addition to the costs of capital, labor and raw materials, there are the costs of obtaining knowledge, overcoming legal and extralegal barriers, and risk-bearing. These latter costs are likely to be greater in the international context.

1. *Legal and Extralegal Barriers*

Legal and extralegal barriers to international transactions are significant factors impairing, and thereby increasing the costs of, transnational ventures. Defendants have traditionally cited the existence of such barriers when seeking to justify transnational ventures.¹⁷¹ Legal and extralegal barriers include tariffs, quotas, domestic preferences and foreign investment restrictions. Some of these barriers are legally insurmountable, but a firm can avoid others by crafting an appropriate organizational structure. One commentator has described the relationship between regulatory barriers and organizational structure as follows:

Government regulation of the joint venture falls into several broad, arbitrary categories: regulations affecting ownership and capitalization (the endowment of the joint venture), regulations relating to management of the joint venture, and regulations restricting economic activities by non-nationals and general reporting requirements imposed by governments upon joint ventures which are designed to gather information as a basis for future restrictive or regulative policy. To some extent, joint venture transactions are the answer to the inability of a non-national to conceptualize and actualize a wholly-owned project through acquisition or new investment in certain governmental situations. The joint venture then is a crea-

¹⁷¹ See, e.g., *Timken*, 341 U.S. at 599 (rejecting 7-2 defendant's claim that foreign cartels were necessary to avoid excessive foreign tariffs and, therefore, not a violation of the Sherman Act); *Minnesota Mining*, 92 F. Supp. at 958.

ture of government regulation.¹⁷²

National policies that restrict some business relationships, while promoting others, may promote any of several goals. Protective labor and investor policies are prominent. Governments protect the owners of domestic production facilities and their labor forces through tariffs, quotas or other restrictive policies against "unfair" competition.¹⁷³ They may also subsidize significant industries, either directly or indirectly, in order to provide a competitive advantage at home or abroad.¹⁷⁴ The net economic impact on a nation imposing such protective policies is likely to be negative,¹⁷⁵ yet most countries continue to impose some legal restraints intended to protect existing domestic producers.

Restrictive policies may also promote domestic development.¹⁷⁶ A developing, labor-intensive nation, for example, may foster foreign investments that transfer technology and know-how to domestic producers¹⁷⁷ and ensure a growing pool of locally-controlled capital.¹⁷⁸ Governments achieve this end through various combinations of restraint and inducement.¹⁷⁹

Transactional restraints are sometimes considered essential to national security.¹⁸⁰ A nation wants to keep sensitive defense-oriented technology in limited and friendly hands. Likewise, domestic control of certain industries and facilities, such as the merchant marine, is often necessary to ensure sufficient capacity during national emergencies.¹⁸¹ Finally, some policies manifest nationalistic pride. Excessive dependence upon foreign nationals for goods and capital can diminish a nation's sense of independent sovereignty.¹⁸²

All of these factors, and others, shape the way that transnational business is conducted. If businesses are to organize efficient enterprises within the framework of these myriad and

¹⁷² Hushon, *Joint Ventures Between Multinationals: Government Regulatory Aspects*, 6 N.C. J. INT'L L. & COM. REG. 207, 208-09 (1981).

¹⁷³ J. JACKSON, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 435-36 (1977); Radway, *supra* note 31, at 58.

¹⁷⁴ J. JACKSON, *supra* note 173, at 442.

¹⁷⁵ P. SAMUELSON, *supra* note 160, at 653-57.

¹⁷⁶ *Id.* at 659.

¹⁷⁷ Radway, *supra* note 31, at 47, 51-75.

¹⁷⁸ *Id.* at 64.

¹⁷⁹ Radway, for example, identifies a variety of related laws adopted by South American countries. *Id.* at 52-57.

¹⁸⁰ P. SAMUELSON, *supra* note 160, at 652.

¹⁸¹ *Id.*

¹⁸² See Radway, *supra* note 31, at 48-49.

sometimes conflicting legal and customary restraints, they must have the flexibility to respond with minimum cost.

2. *Information Costs*

The costs of obtaining knowledge may pose significant barriers to efficient transactions. For example, few, if any, consumers will price automobiles at every dealership in a major metropolitan area; the costs of the search would exceed all possible savings. Yet the consequence may be a less-than-optimal transaction—i.e., a higher price than would be possible with complete knowledge.

The cost of obtaining complete knowledge in an international setting is, for many reasons, likely to be substantially greater than in the domestic sphere. Differences in language, custom, and law raise barriers to obtaining full information. A joint venture with participants from each nation involved may effectively reduce this barrier by internalizing these costs.¹⁸³ The venture can bring knowledgeable individuals within its control structure and provide incentives for faithful performance, rather than relying on market transactions to acquire needed information.¹⁸⁴

3. *Risk-bearing Costs*

Risk-bearing is the transaction cost most heightened in an international context. A rational businesswoman will reduce the expected value of a business transaction by the perceived risk of loss.¹⁸⁵ She will also be more averse to risk as the investment increases in proportion to her wealth.¹⁸⁶ For many of the reasons previously discussed, including legal restraints and imperfect knowledge, the risks of international transactions are higher than those in domestic markets.

Opportunism may also pose a significant risk in transnational business transactions. A foreign venturer may have the support, or at least the sympathy, of his own government and courts when he behaves opportunistically. For example, an American firm transferring know-how overseas may lose the benefits of its exclusive knowledge should its foreign partners breach secrecy agreements. When American jurisdiction is unavailable, however, foreign bodies sympathetic to the goals of their own nationals

¹⁸³ See R. POSNER, *supra* note 156, at 289–90.

¹⁸⁴ *Id.*

¹⁸⁵ C. GOETZ, *supra* note 154, at 77–79.

¹⁸⁶ *Id.* at 79–82.

will determine the fact of breach and the available remedy. The policies of many developing nations are in fact largely hostile to efforts by foreigners to protect technology or intellectual property transferred to their citizens.¹⁸⁷ Mexico, for example, actually requires foreign licensors of technology to transfer the technology to Mexican licensees after a limited license period.¹⁸⁸

Some of the increased risk factors of international transactions are beyond the control of the parties. Various external factors, for example, determine critical changes in monetary exchange rates. Moreover, in some environments, revolutions and other political upheavals represent substantial risks to those conducting business. Companies can purchase insurance against some types of risks.¹⁸⁹ Well structured cooperative ventures can minimize other risks at lower internal costs.

C. *Summary of Economic Considerations*

Organizing a business across national boundaries is more complex and risky than organizing a domestic enterprise is. Yet, economic theory suggests that if participating nations can efficiently bring together the various international factors of production, all the nations will benefit. Each nation can then exploit its own comparative advantages. Business should, therefore, structure itself in ways that promote transnational enterprise within real-world constraints imposed by law, custom, and transactional limitations.

The goal of every legitimate cooperative business enterprise is to provide desired goods or services profitably at prices lower than those of its competition. Prospective transnational venturers, however, face variables that do not generally apply domestically. In particular, legal and cultural barriers may prohibit the most efficient organizational structure. Additionally, these barriers heighten, at times substantially, the costs of risk-bearing. The nature and extent of these structural barriers, as well as the degree of risk, will vary among nations.

All of these factors suggest that transnational venturers should have substantial freedom to structure international enterprise efficiently. They must respond to factors that vary from country to country, and from time to time. Ventures must over-

¹⁸⁷ Radway, *supra* note 31, at 56-57.

¹⁸⁸ Hushon, *supra* note 172, at 213.

¹⁸⁹ The Overseas Private Investment Corporation (OPIC) provides some political risk insurance to Americans investing abroad. *Id.* at 219.

come legal impediments, secure information, and minimize risk. In some countries it may be possible to operate through wholly-owned or controlled subsidiaries, while others may prohibit this practice by law. A traditional contractual (buyer/seller) relationship may be desirable in some situations, but it may lack necessary permanence in others. Intermediate levels of cooperation or integration—joint ventures—may represent the only possible way for some transnational business to exist efficiently. Antitrust policy should not needlessly impair such organizations.

D. *Political Considerations*

The preceding sections have highlighted the economic implications of political interference in market transactions. In addition, one should note that nations can derive direct political benefits from cooperative transnational ventures. Nations having shared economic interests are more likely to have common social and political goals than those that do not. The European Community, for example, has fostered economic cooperation as a vehicle to achieve greater social and political cohesion.¹⁹⁰ Conversely, the lack of full economic cooperation has exacer-

¹⁹⁰ Treaty Establishing the European Economic Community (Treaty of Rome), Mar. 25, 1957, arts. 2–3, U.K.T.S. 15 (1979) (Cmd. 7460), 298 U.N.T.S. 11. Article 2 provides:

It shall be the aim of the Community by establishing a Common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its Member States.

Article 3 provides:

For the purposes set out in the preceding Article, the activities of the Community shall include, under the conditions and with the timing provided for in this Treaty: (a) the elimination, as between Member States, of customs duties and of quantitative restrictions in regard to the importation and exportation of goods, as well as of all other measures with equivalent effect; (b) the establishment of a common customs tariff and of a common commercial policy towards third countries; (c) the abolition, as between Member States, of the obstacles to the free movement of persons, services and capital; (d) the inauguration of a common agricultural policy; (e) the inauguration of a common transport policy; (f) the establishment of a system ensuring that competition shall not be distorted in the Common Market; (g) the application of procedures which shall make it possible to co-ordinate [sic] the economic policies of Member States and to remedy disequilibria in their balances of payments; (h) the approximation of their respective municipal law to the extent necessary for the functioning of the Common Market; (i) the creation of a European Social Fund in order to improve the possibilities of employment for workers and to contribute to the raising of their standard of living; (j) the establishment of a European Investment Bank intended to facilitate the economic expansion of the Community through the creation of new resources; (k) the association of overseas countries

bated political tensions. The perceptions of Americans and Europeans that Japan unfairly invades their markets while excluding foreign goods from its own is becoming an increasing source of political tension between otherwise friendly nations.¹⁹¹ In the context of less-developed nations, the political benefits of joint ventures may be more dramatic. The development of substantial domestic enterprises that exploit local strengths through joint ventures are likely to bring increased wealth and knowledge, planting the seeds of economic growth and political stability.¹⁹²

V. DEVELOPING AN ANALYTICAL APPROACH TO TRANSNATIONAL JOINT VENTURES

This section discusses in greater detail two categories of transnational joint ventures that the courts have subjected to antitrust analysis: (1) outbound ventures—those adding enterprise capacity outside of the United States, and (2) inbound ventures—those creating new enterprise capability in the United States. Admittedly, these classifications are arbitrary and lack clear legal significance. Ultimately, the legal consequence of any venture depends upon its effects on American commerce. It is, however, analytically helpful to distinguish between ventures having their immediate impact outside of the United States and those having largely domestic effects.

A. Outbound Ventures

Outbound ventures may facilitate the sale of American goods or services abroad, create new productive capacity in a foreign nation, or achieve some combination of both. Such a venture may, for example, create a foreign sales agency to sell the wares of the American venturers, manufacture goods abroad, and also buy and sell goods produced elsewhere.

A “pure” export association currently poses the fewest problems under the antitrust laws. Since 1918 the Webb-Pomerene Act has recognized a limited antitrust exemption for these

and territories with the community with a view to increasing trade and to pursuing jointly their efforts towards economic and social development.

Id. at 11–12, 298 U.N.T.S. 15–16.

¹⁹¹ See *Senate Urges Reagan to Act Against Japan*, Wash. Post, Mar. 29, 1985, at A1, col. 4.

¹⁹² Radway, *supra* note 31, at 63, 68.

associations.¹⁹³ More recently, the Export Trading Company Act of 1982¹⁹⁴ has limited the Sherman and Federal Trade Commission Acts' coverage of concerted export activities and has established a certification procedure administered by the Department of Commerce. Export activities are no longer subject to the prohibitions of the Sherman Act or the "unfair methods of competition" portion of section 5 of the Federal Trade Commission Act, unless they have a direct, substantial, and reasonably foreseeable effect on domestic commerce or the export trade of a U.S. competitor.¹⁹⁵ Furthermore, certification by the Commerce Department provides substantial protection against antitrust liability for activities within the scope of the certificate.¹⁹⁶

Cooperative ventures that restrict exports from¹⁹⁷ or imports to the United States are the most problematic. The *Timken* and *Minnesota Mining* cases addressed these problems. The territorial allocations in *Timken* had characteristics of an international cartel, and condemnation may have been appropriate.¹⁹⁸ The Court's approach, however, would readily condemn efficient, productive ventures as well as anticompetitive cartels. Noting that the Sherman Act embodies an "assumption . . . that export and import trade in commodities is both possible and desirable,"¹⁹⁹ the Court seemed unwilling to consider the fact that foreign policy and custom may preclude such trade. Only Congress, the Court held, could accommodate parties seeking to overcome trade barriers through cooperative ventures that restrained U.S. foreign commerce.²⁰⁰

The extreme position taken by the Court in *Timken*—holding that they would treat foreign commercial activities no differently than domestic conduct in the antitrust area—ignores economic and political reality. When the most efficient, and perhaps only

¹⁹³ 15 U.S.C. §§ 61–66 (1982).

¹⁹⁴ Pub. L. No. 97–290, 96 Stat. 1233 (1982).

¹⁹⁵ 15 U.S.C. § 6(a) (1982).

¹⁹⁶ See 15 U.S.C. §§ 4011–21 (1982) (procedures for receiving and maintaining export trade certificates of review and the protection conferred by certificates).

¹⁹⁷ Unfortunately, export associations enjoy an antitrust exemption under the Webb-Pomerene Act, 15 U.S.C. §§ 61–66 (1982), even when engaged in traditional cartel activities, such as output restriction and price enhancement. See NAT'L COMM'N, *supra* note 30, at 298–300.

¹⁹⁸ *Timken*, 341 U.S. at 597–98 (reciting District Court's finding that "the dominant purpose of the restrictive agreements. . . was to avoid all competition either among themselves or with others."). For facts and holding of *Timken*, see *supra* text accompanying notes 128–37.

¹⁹⁹ *Id.* at 599.

²⁰⁰ *Id.*

possible, way for an American firm to sell abroad is to combine its strengths—patents, trade secrets, know-how, management skills—with foreign labor or capital, that firm must protect itself against unreasonable competition from its foreign partners, as well as from the new entity. If, for example, foreign producers have a major competitive advantage because their labor costs are substantially lower than American producers, the transfer of American know-how or technology without reasonable restrictions could devastate the domestic firm.²⁰¹ Moreover, the vagaries of foreign economic policies and the fear of opportunistic abuse may make a transfer of business secrets undesirable without ongoing supervision and control. Under such circumstances, an otherwise desirable transaction would not occur, to the detriment of both American producers and foreign consumers.

Meanwhile, potential foreign competitors would naturally seek the undisclosed information through legal and sometimes illegal means. Competitors have successfully used reverse engineering and industrial espionage in the past to penetrate markets developed by American firms. When foreign producers succeed, American competitors lose actual and potential foreign markets; if the cost advantages of foreign production are substantial, American producers ultimately may lose their domestic market. The advantages of permitting restrictive agreements under these circumstances are manifest. Firms can maintain domestic production and perhaps secure some export markets. While a low-cost foreign producer exporting goods to the United States adversely affects our trade balance, a foreign joint venture will send capital to its American parent, improving our trade account.

If legal and extralegal barriers to trade and foreign investment did not exist, restrictive joint ventures might not be justified. The American producer with desirable knowledge or ability could simply open foreign operations, as either wholly-owned subsidiaries or divisions. The producer would then be free, short of a monopolistic violation of section 2 of the Sherman Act, to set prices and allocate markets among its various operations. In the “real world” of international investment, however, these options may not be available. A restrictive joint venture—restrictive to

²⁰¹ The Justice Department recognizes that restraints on competition under such circumstances should be permitted if reasonable in scope or duration. ANTITRUST DIV., U.S. DEP'T OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 28–31 (rev. ed. Mar. 1, 1977) *reprinted in* ANTITRUST & TRADE REG. REP. (BNA) No. 799, at E–1 (Feb. 1, 1977) [hereinafter cited as ANTITRUST GUIDE].

prevent opportunism and joint to overcome legal hurdles—may then be the second best option.

Judge Wyzanski's decision in *Minnesota Mining* was particularly insensitive to the factors that foster overseas production, and to the benefits that can flow from the profits received by Americans that have invested in foreign production.²⁰² The goals that Judge Wyzanski attached to the antitrust laws may explain the outcome in *Minnesota Mining*: "Congress in the Sherman Act has condemned whatever unreasonably restrains American commerce regardless of how it fattens profits of certain stockholders. Congress has preferred to protect American competitors, consumers and workmen."²⁰³ It is unlikely, however, that American consumers would be injured solely by foreign manufacturing activities. In fact, prices are likely to decrease domestically if fewer finished products are exported for sale abroad. Prices will predictably drop as the domestic supply increases.²⁰⁴

Foreign production is also unlikely to affect American competitors adversely, at least not in ways that invoke antitrust concerns. Antitrust is intended to protect competition, not competitors,²⁰⁵ and should not prevent American producers from organizing efficiently to capture foreign markets. If, under cases like *Minnesota Mining*, Americans cannot jointly create foreign productive capacity legally, unless it is impossible to export U.S.-made goods, foreign producers may effectively reserve those markets for themselves. Individual firms may lack the capacity to finance or assume the risks of foreign production; even when it is economically possible, foreign laws may bar individual entry. Since the U.S. antitrust laws cannot protect domestic firms from the competition of more efficient foreign producers in foreign markets, courts should not interpret these laws to prevent U.S. firms from reasonably achieving efficiencies available to others.

The final goal identified by Judge Wyzanski discloses the most likely justification for his decision: protecting American jobs. This goal is difficult to justify and potentially self-defeating. Once again, if antitrust bars Americans from investing in efficient

²⁰² For facts and holding of the *Minnesota Mining* decision, see *supra* text accompanying notes 138–43.

²⁰³ *Minnesota Mining*, 92 F. Supp. at 962.

²⁰⁴ See A. ALCHIAN & W. ALLEN, *EXCHANGE & PRODUCTION: COMPETITION, COORDINATION & CONTROL* 60–62 (3d ed. 1983) (explaining the effect of adjustments to supply).

²⁰⁵ *Copperweld*, 104 S. Ct. at 2740 n.14.

foreign production, it will invite foreign controlled competition. Protectionism may also cost jobs in the United States: if the profits that the court found so distressing do not flow to American investors, they may be prompted to move their capital to different industries or abroad.

The paucity of cases relating to ventures having their primary impact outside of the United States may demonstrate that the government has generally recognized their potential for efficient organization. The Justice Department, for example, has adopted a fairly sympathetic rule of reason approach to the analysis of transnational joint ventures.²⁰⁶ One can interpret *Timken* and *Minnesota Mining*, therefore, as extraordinary factual situations—one involving an association having characteristics of a world-wide cartel, the other involving a union of dominant competitors with substantial control over a natural resource essential to would-be competitors. Their analyses, however, if followed literally, would prohibit many desirable ventures. *Timken's* slavish commitment to form, under which the venturers' separate legal identities condemned them to a per se prohibition against pricing or territorial agreements, and *Minnesota Mining's* protective labor position pose particular threats to those contemplating desirable and productive ventures.

B. *Inbound Ventures*

Those ventures that create new enterprise capability in the United States raise different issues. They bring new products or enterprise capacity and, therefore, competition to the United States. The FTC has recently subjected two major ventures sharing these characteristics to significant antitrust scrutiny: the Yamaha-Brunswick and the GM-Toyota joint ventures. The Federal Trade Commission found that the former violated section 7 of the Clayton Act but, approximately five years later, allowed the GM-Toyota venture to proceed. The differences in analyses between the two cases are striking. They demonstrate a significant shift in economic focus, one emphasizing concentration and the other efficiency. A comparison of these two determinations may hint at the likely direction of antitrust enforcement in the area of transnational joint ventures.

²⁰⁶ See generally ANTITRUST GUIDE, *supra* note 201.

1. *Yamaha-Brunswick*

As already noted, Yamaha and Brunswick, through a subsidiary named Mariner, became equal owners of Sanshin, a Japanese outboard motor manufacturer.²⁰⁷ Sanshin planned to produce motors which its parents would sell under their Yamaha and Mariner brand labels.²⁰⁸ Yamaha was granted the exclusive right to sell Sanshin motors in Japan, and Mariner was given exclusive rights to sales in North America and Australia.²⁰⁹ Initially, the venture was to last for ten years, followed by automatic three-year renewals unless either side decided to terminate the agreement.²¹⁰

Brunswick already produced and sold motors domestically under the Mercury brand name.²¹¹ Prior to founding the joint venture, Brunswick's Mercury division determined that it needed a second, low horsepower, low price outboard motor to sell under a different brand.²¹² Yamaha produced and sold outboard motors abroad.²¹³ It had unsuccessfully attempted to penetrate the American market by selling to Sears for resale under the Sears label, but the price of its motor was too high for the Sears market.²¹⁴

The Federal Trade Commission's administrative law judge (ALJ) determined that any likely anticompetitive effects of the venture were outweighed by two beneficial effects: (1) the venture produced a new entrant, Mariner, into the American market, and (2) it enhanced the likelihood of Yamaha's future entry.²¹⁵ The Commission, however, reversed the ALJ, applying a section 7 potential entrant analysis. The Commission found that Yamaha was an actual potential entrant, i.e., that it would enter the market independently if the venture was not an available option.²¹⁶ Yamaha had all the indicia of an entrant: name recognition, a distribution system in place (for motorcycles and snowmobiles), and the ability to produce a full line of outboard motors. Moreover, the Commission found that the joint venture

²⁰⁷ See *supra* text accompanying notes 145-47.

²⁰⁸ *In re Brunswick Corp.*, 94 F.T.C. 1174, 1187-88 (1979).

²⁰⁹ *Id.*

²¹⁰ *Id.* at 1187.

²¹¹ *Id.* at 1182.

²¹² *Id.* at 1204.

²¹³ *Id.* at 1184-85.

²¹⁴ *Id.* at 1209.

²¹⁵ *Id.* at 1254.

²¹⁶ *Id.* at 1272.

removed Yamaha as an existing competitive threat to American producers. "Yamaha's ability to inspire the fear of competition in the hearts of U.S. manufacturers was already clear before Yamaha entered the joint venture."²¹⁷ On remand, the ALJ recommended that the Commission require the parties to terminate the joint venture. The FTC ordered Mariner to sell its Sanshin stock holdings to Yamaha within ninety days at a price determined by "the value of the net tangible assets per share."²¹⁸ The decision was upheld, with some minor modifications, by the Eighth Circuit Court of Appeals.²¹⁹

The decision of the FTC in the Yamaha-Brunswick case demonstrated a strong commitment to structural analysis (consistent with section 7 jurisprudence) and a limited concern for "efficiency" arguments. The market would be structurally superior if Yamaha remained as a potential entrant or entered *de novo*. The fact that the joint venture facilitated entry of a new brand, allowing both Brunswick and Yamaha to participate more meaningfully in the U.S. market, was not compelling to the Commission. The benefits of actual or perceived potential individual entry outweighed the concrete benefits of an actual joint entry.

2. General Motors-Toyota

The GM-Toyota joint venture was subjected to a different sort of analysis than was the Yamaha-Brunswick agreement. The FTC majority was largely unconcerned with structural issues, focusing instead on potential efficiencies—not potential competition—and transaction costs.²²⁰ On February 17, 1983, General Motors and Toyota announced that they had reached an agreement to produce jointly a subcompact car in the United States.²²¹ The venture would produce a version of the Toyota "Sprinter," a model then being sold only in Japan, at GM's Fremont, California, plant.²²² The two firms would share equally in the equity of the

²¹⁷ *Id.* at 1273.

²¹⁸ *Yamaha Motor Co. v. FTC*, 657 F.2d 971, 975 (8th Cir. 1981).

²¹⁹ *Id.*

²²⁰ See General Motors Corp. and Toyota Motor Corp.; Correction, 48 Fed. Reg. 57,314 (1983) (statement of Chairman James C. Miller III, Commissioner George W. Douglas and Commissioner Terry Calvani) [hereinafter cited as GM-Toyota Majority Statement].

²²¹ Note, *The GM-Toyota Joint Venture: Legal Cooperation or Illegal Combination in the World Automobile Industry?* 19 TEX. INT'L L. J. 699, 705 (1984).

²²² General Motors Corp. and Toyota Motor Corp.; Proposed Consent Agreement

new corporation and elect an equal number of directors.²²³ Toyota, however, would appoint the principal manager.²²⁴ Each parent would provide approximately half of the component parts, which would be assembled at Fremont by members of the United Auto Workers union.²²⁵

Prevailing section 7 standards would likely invalidate the GM-Toyota joint venture. As of 1984 GM was the largest automobile manufacturer in the world,²²⁶ and had equity interests in other foreign automobile producers, including Isuzu and Suzuki.²²⁷ It sold more passenger cars than any other producer, in either the United States or the rest of the world.²²⁸ Toyota was the third largest automobile manufacturer in the world.²²⁹ It ranked fourth in sales volume in the United States for all passenger cars, and second for subcompacts.²³⁰

The relative size of these firms, the concentrated nature of the automobile industry, and the likelihood that either or both would expand their positions in the subcompact market regardless of the venture, would have made the agreement extremely suspect if judged by the standards applied in *Penn-Olin* or *Brunswick*.²³¹ In this case, however, the Commission's majority dismissed traditional structural analysis:

In conducting its analysis, the Commission recognized that the Fremont venture should not be viewed factually as a merger between GM and Toyota because the areas of continued competition between the companies will dwarf the limited area of cooperation represented by the joint venture. Because the structure and the small size of the venture does [sic] not appear to pose any significant structural problems, traditional concentration analysis, whether expressed through Hefindahls [sic] or other measures, will

With Analysis to Aid Public Comment, 48 Fed. Reg. 57,246, 57,248, 57,251 (1983) [hereinafter cited as GM-Toyota Proposed Consent Agreement].

²²³ *Id.* at 57,248.

²²⁴ *Id.*

²²⁵ GM-Toyota Majority Statement, 48 Fed. Reg. at 57,315.

²²⁶ GM-Toyota Proposed Consent Agreement, 48 Fed. Reg. at 57,252 (Comm'r Michael Pertschuk, dissenting).

²²⁷ Note, *supra* note 221, at 705 n.38.

²²⁸ GM-Toyota Proposed Consent Agreement, 48 Fed. Reg. at 57,252.

²²⁹ Clanton, *Horizontal Agreements, The Rule of Reason, and the General Motors-Toyota Joint Venture*, 30 WAYNE L. REV. 1239, 1257 (1984).

²³⁰ GM-Toyota Proposed Consent Agreement, 48 Fed. Reg. at 57,252. *See also* Clanton, *supra* note 229, at 1257 n.57.

²³¹ *See supra* text accompanying notes 106-13, 144-51.

be of limited value.²³²

This analysis ignores the fact that the market for subcompact cars might be structurally superior if both Toyota and GM expanded internally or if they remained as potential market entrants.

Having disposed of the structural concerns, the majority found three principal benefits to the venture. First, it would increase the number of subcompact cars available to American consumers.²³³ Second, the venture would enable GM to produce cars immediately at a lower cost than it could manage independently.²³⁴ Finally, GM would learn Japanese management and manufacturing techniques.²³⁵ The Commission majority did recognize, however, two problems with the venture as originally proposed. First, the venturers had agreed to make future joint decisions about production levels. If the corporation were permitted to expand indefinitely, however, its perceived benefits could be lost: neither GM nor Toyota would ever establish an independent competing firm.²³⁶ Under FTC pressure, therefore, the parties consented to limit the venture to a single plant with a maximum capacity of about 250,000 units annually and to limit the agreement's term to twelve years.²³⁷ The risk of excessive and anticompetitive communications between two major competitors also concerned the majority.²³⁸ The consent decree thus restricted the nature of communications between the firms and imposed an obligation on the parties to document certain conversations.²³⁹

Commissioners Bailey and Pertschuk dissented. Commissioner Bailey's statement captured the dissenters strong feelings:

In this decision, the Commission has swept another set of generally recognized antitrust law principles into the dustbin, using again the incorporeal economic rhetoric that now dominates Commission decision-making. In this

²³² GM-Toyota Majority Statement, 48 Fed. Reg. at 57,315.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.* at 57,316.

²³⁷ General Motors Corp. and Toyota Motor Corp.; Prohibited Trade Practices, and Affirmative Corrective Actions, 49 Fed. Reg. 18,289, 18,290 (1984) [hereinafter cited as GM-Toyota Final Order]. The time period was later cut by the parties to eight years as part of a settlement with Chrysler Corporation. Burgess, *Joint Auto Pact Set*, Wash. Post, Apr. 16, 1985, at D1, col. 6.

²³⁸ GM-Toyota Majority Statement, 48 Fed. Reg. at 57,316.

²³⁹ GM-Toyota Final Order, 49 Fed. Reg. at 18,290-91.

case, the decision results in the blessing of a business proposal that is both breathtaking in its audacity and mind-numbing in its implications for future joint ventures between leading U.S. firms and major foreign competitors that seek to lend a friendly helping hand.²⁴⁰

Applying traditional section 7 analysis—as in *Penn-Oil* and *Brunswick*—the dissenters found the purported efficiency gains to be elusive but the anticompetitive threat very real.²⁴¹ Unlike the majority, they found a structural analysis both appropriate and damning. The venture brought together two price leaders, both of which were dominant in relevant markets.²⁴² Long-term structural implications were even more perplexing. An approval of this merger would, in the dissenters' view, invite similar partnerships between other American and foreign automobile manufacturers.²⁴³ This concern has been borne out. Chrysler has announced plans to produce small cars in America through a joint venture with Mitsubishi;²⁴⁴ Ford has agreed to produce a car jointly in Mexico with Toyo Kogyo (Mazda).²⁴⁵

Several additional factors helped provoke the dissents. GM's own studies showed that the joint venture would not increase the volume of cars sold in the United States; most of the new output would replace sales of other Toyota or GM cars.²⁴⁶ The transfer price of the venture's car is tied to the price of Toyota's Corolla, giving Toyota significant control over the ultimate sales price of its future competitor.²⁴⁷ Despite restrictions imposed by the consent decree, the two corporations will exchange significant competitively sensitive data.²⁴⁸ Finally, the majority's failure to consider the possibility of less restrictive ways to achieve the purported benefits of the joint endeavor disturbed Bailey and Pertschuk.²⁴⁹ Less dominant Japanese firms could provide knowledge and experience to U.S. firms seeking to capture supe-

²⁴⁰ GM-Toyota Proposed Consent Agreement, 48 Fed. Reg. at 57,257 (Comm'r Patricia P. Bailey, dissenting).

²⁴¹ *Id.* at 57,255–56; see also *id.* at 57,252–53 (Comm'r Pertschuk, dissenting).

²⁴² GM-Toyota Proposed Consent Agreement, 48 Fed. Reg. at 57,252 (Comm'r Pertschuk, dissenting).

²⁴³ *Id.*; GM-Toyota Proposed Consent Agreement, 48 Fed. Reg. at 57,255 (Comm'r Bailey, dissenting).

²⁴⁴ Burgess, *supra* note 237, at D1, col. 6.

²⁴⁵ Note, *supra* note 221, at 705 n.37.

²⁴⁶ GM-Toyota Proposed Consent Agreement, 48 Fed. Reg. at 57,257 (Comm'r Bailey, dissenting).

²⁴⁷ *Id.* at 57,255.

²⁴⁸ *Id.* at 57,256.

²⁴⁹ *Id.* at 57,254 (Comm'r Pertschuk, dissenting).

rior Japanese productivity and managerial know-how.²⁵⁰ Indeed, some of these firms already had ties to GM.²⁵¹ The majority, however, was generally uninterested in these less threatening alternatives.

What does the GM-Toyota decision suggest for future antitrust analysis? It is dangerous to generalize. The Commission's decision demonstrates the ascendancy of efficiency-oriented economists in the current administration. These individuals see greater potential gains from cooperative economic activity than traditional antitrust analysis will usually admit, and they have more faith in the self-correcting power of markets than antitrust precedents will generally acknowledge. Moreover, the FTC's departure from traditional analysis seems so dramatic that the case may have little impact on judicial developments. It is less a well-articulated and justified evolution of antitrust law than it is an economic leap of faith. The majority's statement is driven largely by theory, brushing aside facts that have significant intuitive and legal value. A court would be less likely to overlook the admissions of the parties concerning, for example, static overall output and the anticipated effects of the venture's pricing mechanism. Furthermore, the availability of less threatening alternatives is a major consideration in traditional antitrust analysis.

However, neither the extraordinary facts of the GM-Toyota case nor the FTC's failure to justify its analytical approach detracts from the contribution the case makes to a realistic antitrust analysis in the area of transnational joint ventures. The Commission brought transaction cost analysis to the fore by treating this monumental joint venture largely as a device to minimize the costs of obtaining knowledge. Courts should not reflexively condemn organizational structures that overcome knowledge and other barriers while minimizing transaction costs. Perhaps the most valuable contribution of the GM-Toyota joint venture to the American economy is its ability to foster a new, industry-wide productive environment. The Japanese management structure may help induce American workers and suppliers to accept new business relationships and working conditions.²⁵² The United Auto Workers union has, in fact, demonstrated its willingness to enter into different, less costly labor contracts with Japanese manufacturers in the United States and with the GM-Toyota joint

²⁵⁰ *Id.*

²⁵¹ Note, *supra* note 221, at 705 n.38.

²⁵² *Cf.* GM-Toyota Majority Statement, 48 Fed. Reg. at 57,315.

venture.²⁵³ This change ultimately could lead the entire industry to a new international competitive structure,²⁵⁴ and do so with fewer adjustment pains—transaction costs of change—than a totally domestic restructuring would generate.

C. *Synthesis*

The potential of joint ventures to produce new, efficient enterprise capacity requires a careful and sympathetic analysis. Neither a rigid “separate entities” approach under section 1 nor an inflexible section 7 structural analysis is desirable. Antitrust analysis is surely moving in this direction. The Justice Department’s International Operations Guidelines,²⁵⁵ for instance, demonstrate a more flexible section 1 analysis than that of the established case law. The Department’s enforcement policy is far more sympathetic than a literal application of *Timken* and *Minnesota Mining* would suggest.

The “joint venture” is a particularly common form of business organization in the international field, for a variety of entirely legitimate reasons. Some joint ventures are, . . . essentially “one shot” consortia engaged in a single venture limited in time and scope. Others may involve what are essentially permanent combinations for the production or distribution of products and services. Joint ventures may be designed for a variety of business reasons—e.g., to take advantage of complementary skills or large economies of scale, to spread large risks, or to give international enterprise a local flavor.²⁵⁶

Section 7 analysis is more problematic. The GM-Toyota majority statement represents an analysis that is sympathetic to the international benefits of transnational joint ventures. The Commission reached its conclusion, however, largely by ignoring section 7 jurisprudence. The decision points the way to a sound and sympathetic analysis, but it does not persuasively suggest how existing precedents can take the business counselor to that point; the case thus has limited predictive value.

²⁵³ Brown, *UAW, Mazda Agree on Terms for New Michigan Plant*, Wash. Post, June 11, 1985, at D3, col. 4.

²⁵⁴ GM-Toyota Majority Statement, 48 Fed. Reg. at 57,315.

²⁵⁵ ANTITRUST GUIDE, *supra* note 201.

²⁵⁶ *Id.* at 19–20 (footnotes omitted).

VI. CONCLUSION

The United States is not an insular market. International trade is an essential part of its economy, and the United States has become increasingly unsuccessful in efforts to maintain a reasonable balance in its trade relationships. American producers often have trouble exporting their goods abroad or even competing at home with foreign-made goods. This new reality calls for a more comprehensive approach to international transactions than courts have traditionally applied in antitrust analysis. Merchandise and services are not the only goods that travel across national boundaries; firms also import and export capital, technology, know-how and managerial skills. Complex and diverse organizational structures may be essential to locate, assemble, and manage resources efficiently within the constraints of local law and custom.

Antitrust offers two broad types of analysis: *per se* rules and the rule of reason. In their extreme forms, the former are consciously rigid, while the latter is infinitely flexible. Neither type of analysis by itself serves particularly well to evaluate a transnational joint venture. A simple *per se* rule of either legality or illegality would exaggerate either the benefits or the harms associated with a particular venture. A full rule of reason analysis, on the other hand, would needlessly complicate cases involving such complex relationships. Where, then, should the courts draw the line? Courts should judge bona fide transnational joint ventures by the rule of reason, according them a strong presumption of validity. Those challenging such a venture should be required to establish convincingly that the transaction is, or is highly likely to be, anticompetitive. This terminology may be imprecise, but it is not without legal significance. Businesses could confidently proceed with ventures that stimulate international productivity. Legal advisors could be less cautious in their role as counselors. When possible, the judiciary should also shape remedies that preserve productive joint ventures. The restrictions agreed to by GM and Toyota, for example, demonstrate several limitations that can minimize the potential harm of cooperative endeavors: restrictions on productive scope, duration of the venture, and information exchanges. Courts should impose such restraints, however, only when they are essential to the maintenance of a competitive market.

This proposal may reflect existing policy under section 1 of

the Sherman Act. If not, there are established precedents²⁵⁷ and contemporary decisions²⁵⁸ that would support the judicial creation of a policy that supports productive transnational joint ventures. Section 7, on the other hand, may require legislative changes.²⁵⁹ It reaches anticompetitive effects in their incipency²⁶⁰ and focuses on market structure. The National Cooperative Research Act of 1984²⁶¹ provides a model for a reasonable amendment. It provides:

Sec. 3. In any action under the antitrust laws, or under any State law similar to the antitrust laws, the conduct of any person in making or performing a contract to carry out a joint research and development venture shall not be deemed illegal per se; such conduct shall be judged on the basis of its reasonableness, taking into account all relevant factors affecting competition, including, but not limited to, effects on competition in properly defined, relevant research and development markets.²⁶²

Transnational joint ventures should be recognized in antitrust analysis as organizations largely structured to meet complex international circumstances. They often bring production factors together to achieve otherwise unattainable efficiencies. When they bring truly new enterprise capacity into existence, cooperative transnational business endeavors should be presumptively valid. The benefits are tangible, although the reasons for the particular structure may be difficult to identify or measure. Therefore, those challenging such ventures under the antitrust laws should properly carry a heavier than usual burden. They should clearly establish an actual or extremely likely antitrust injury. Additionally, courts should attempt to salvage transnational ventures by excizing offending provisions. The United States and its trading partners are likely to gain in efficiency and productivity if antitrust policy recognizes the unique role of joint ventures in international commerce.

²⁵⁷ See *supra* text accompanying notes 56-66, 79-85.

²⁵⁸ See *supra* text accompanying notes 88-105.

²⁵⁹ See Garvey, *Exports, Banking and Antitrust: The Export Trading Company Act—A Modest Tool for Export Promotion*, 5 Nw. J. INT'L L. & BUS. 818, 834, 838 (1983). As Secretary of Commerce, Malcolm Baldrige suggested that section 7 should be repealed. 48 ANTI-TRUST & TRADE REG. REP. (BNA) No. 1204, at 385 (Feb. 28, 1985). The author believes that such a drastic step is unjustified.

²⁶⁰ *Brown Shoe Co. v. United States*, 370 U.S. 294, 317 (1962).

²⁶¹ Pub. L. No. 98-462, 98 Stat. 1815 (1984).

²⁶² *Id.* at § 3.